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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	GEN Docket No. 90-314
	)	ET Docket No. 92-100
	)	
	)	RM-7140, RM-7175, RM-7617
	)	RM-7618, RM-7760, RM-7782
Amendment of the Commission's	)	RM-7860, RM-78977, RM-7978
Rules to Establish New Personal	)	RM-7979, RM-7980
Communications Services	)	
	)	PP-35 through PP-40, PP-79
	)	through PP-85

REPLY COMMENTS

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REPLY COMMENTS

LiTel Telecommunications Corporation d/b/a LCI International ("LCI"), by its attorneys and pursuant to the Commission's Notice in this proceeding,[1] hereby submits reply comments concerning the Commission's implementation of personal communications services ("PCS").

I. Introduction and Summary

LCI is a facilities-based interexchange carrier headquartered in Dublin, Ohio. The company operates a fiber optic network that provides both switched and private line services. LCI has filed extensive comments on PCS in related proceedings before the Commission and the National Telecommunications and Information Administration ("NTIA")[2] and

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[1] Notice of Proposed Rulemaking and Tentative Decision, 7 FCC Rcd 5676 (1992) ("Notice").

[2] See Litel Telecommunications Corporation Comments filed October 1, 1990 ("Litel Comments") and reply comments filed January 15, 1991 ("Litel Reply Comments") in response to the Commission's Notice of Inquiry in GEN Docket No. 90-314, 5 FCC

(continued...)

has conducted extensive PCS testing pursuant to experimental authorization 1481-EX-R2-90.

LCI has urged the Commission to implement PCS as quickly as possible. The overwhelming majority of commentors in the latest round of comments agree. In particular, LCI has advocated that the Commission should allocate 200 MHz to PCS, allowing two or more operators in each market to share spectrum with existing users.[3] With regard to the PCS regulatory framework, LCI has suggested that the Commission adopt a flexible set of policies, including:[4]

- Blanket licensing of base stations, relays, and handsets (id. at 27-29);
- A "market" definition, larger than MSAs and smaller than nationwide, that would encourage competition, innovation, and entry (id. at 29-30);

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[2](...continued)
Rcd 3995 (1990). In the Matter of Cellular 21, Inc., RM-7140, released November 3, 1989; In the Matter of PCN America, Inc., RM-7175, released November 15, 1989; In the Matter of an Inquiry Relating to Preparation for the International Telecommunications Union World Administrative Radio Conference for Dealing with Frequency Allocations in Certain Parts of the Spectrum, Gen. Dkt. No. 89-554, released December 13, 1989; In the Matter of Establishment of Procedures to Provide a Preference to Applications Proposing An Allocation for New Services, Gen. Dkt. No. 90-217, released April 27, 1990; In the Matter of Comprehensive Study of the Domestic Telecommunications Infrastructure, NTIA Dkt. No. 91296-9296, released January 3, 1990; In the Matter of Comprehensive Study of the Domestic Telecommunications Infrastructure, NTIA Dkt. No. 91296-9296, released January 3, 1990; In the Matter of Comprehensive Policy Review of Use and Management of the Radio Frequency Spectrum, NTIA Notice of Inquiry, released December 4, 1989.

[3] Litel Comments at 22-23.

[4] Litel also suggested that the Commission remain flexible in considering technical standards. Id. at 38-42.

- The award of pioneer preferences to PCS innovators like LCI (id. at 34-35);
- Preemption of state regulation of entry/exit and technical standards (id. at 35-36);
- Requirement of PCS interconnection to the PSTN (id. at 37-38); and
- Regulation of PCS providers as common or private carriers, depending on how licensees offer services (id. at 36-37).

Based on competitive concerns, LCI forcefully argued against permitting AT&T, local exchange carriers ("LECs"), and cellular operators to apply for newly allocated frequencies.[5] LCI herein addresses two interconnected issues: the number of licensees in each market and eligibility.

II. The Comments Support The Authorization of 4-5 Licensees Per Market

The Commission proposes to issue three licenses per market, each with 30 MHz of spectrum.[6] A large number of commenters argue that five licensees should be authorized in each market,[7] and some argue that each licensee should operate on at least 40 MHz spectrum.[8] LCI submits that both sets of commenters are

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[5] Id. at 30-34.

[6] Notice, ¶¶ 34-37.

[7] E.g., CTIA Comments at 28-30; AT&T Comments at 10-11. However, these commenters support allocating only 20 Mhz per licensee.

[8] E.g., Cox Enterprises Comments at 10; Time Warner Telecommunications Comments at 4-7. However, Time Warner supports licensing only two operators per market.

correct. Therefore, the Commission should allocate 200 MHz to PCS, with five licensees operating on 40 MHz each.[9]

LCI submits that it is absolutely essential that PCS in each market be subject to effective competition. If the Commission permits LECs and cellular carriers to participate, they could dominate markets in which only three licenses are granted. Under the Commission's proposal, it is likely that PCS would be provided in each market by a LEC and two cellular operators. This provider configuration would not be conducive to lower prices, despite the existence of efficiencies of scope and scale. An award of five licenses per market would better assure the development of robust competition.

In addition, it is unclear whether 20-30 MHz is sufficient to support PCS, given the current operation of microwave licensees in the 2 Ghz spectrum. In addition, the preferred technology -- spread spectrum -- spreads the transmitted energy over the width of the allocated band. Thus, spread spectrum operations require a greater amount of spectrum whether or not other users occupy the band. Given these circumstances, the Commission should err on the side of being overly generous in its allocation to ensure that PCS develops rapidly.[10]

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[9] See Lincoln Telephone Comments at 9-10 (advocating allocation of 160 Mhz to PCS); Telocator Comments at 2-3 (advocating allocation of 140 Mhz to PCS).

[10] E.g., Cablevision Systems Comments at 6-7.

III. The Comments Support LCI's Position That AT&T, LECs, and Cellular Operators Should Not Be Eligible to Apply For Newly Allocated PCN Frequencies

In evaluating what licensing scheme will best serve the public interest, the Commission should consider competition in the PCS market and in other affected markets.[11] If the Commission decides to license only three operators per market, exclusion of the LECs, AT&T and cellular operators is warranted because these firms can and will leverage their current market power to control this fledgling industry. LCI's concerns about anticompetitive behavior by dominant firms are mirrored in the submissions of other commenters.[12]

The provision of PCS services on new frequencies by the LECs, AT&T or cellular providers will adversely affect competition in the nascent PCS market. These companies have market power and will have every incentive to block development of PCS.[13] Entry into the PCS market will provide these firms

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[11] See NARUC v. FCC, 525 F.2d 630, 636 & n.25 (D.C. Cir. 1976), cert denied, 425 U.S. 992 (1976) (competitive factors may properly be considered by the Commission under the public convenience, interest or necessity standard); General Tel. Co. of the Southwest v. United States, 449 F.2d 846, 858 (5th Cir. 1971) (public interest standard requires consideration of the competitive effects of agency decisions).

[12] See Cox Enterprises Comments at 16-17; PCN America Comments at 6-8; Tandy Comments at 7.

[13] The Supreme Court has stated that "the use of monopoly power, however acquired, to foreclose competition, to gain a competitive advantage, to foreclose competition, to gain a competitive advantage, or to destroy a competitor is unlawful." United States v. Griffith, 334 U.S. 100, 107 (1948). In the Griffith case, a movie theater chain used its monopsony power in a few towns to extract from distributors exclusive rights in other

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with the opportunity to leverage their monopoly power in their current markets to gain an unfair advantage over potential PCS competitors.[14]

Competition in the PCS market is vital. Competitive pressures reduce prices, increase efficiency and foster rapid technological development. For these reasons, the Commission[15] and the courts strive to promote competition and eradicate forces that seek to strangle the healthy operation of the marketplace. As stated by the court in Berkey Photo, the United States has "a firm national policy that the norm for commercial activity must be robust competition."[16]

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[13](...continued)
markets where it faced competition. The Supreme Court held that monopoly power had been used illegally "to beget monopoly." 334 U.S. at 108.

[14] The antitrust laws have long recognized the danger of allowing such monopoly leveraging. See Berkey Photo, Inc., v. Eastman Kodak Co., 603 F.2d 263, 275 (2d Cir. 1979) ("[i]t is clear that a firm may not employ its market position as a lever to create -- or attempt to create -- a monopoly in another market"); Smith-Kline Corp. v. Eli Lilly & Co., 575 F.2d 1056 (3d Cir.), cert. denied, 439 U.S. 838 (1978). In fact, monopoly leveraging is the basis by which the Bell Operating Companies ("BOCs") where excluded from manufacturing, information services and interexchange communications under the Modified Final Judgment ("MFJ"). United States v. Western Elec. Co., 552 F. Supp. 131, 194 (D.D.C. 1982).

[15] See In the Matter of Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 Mhz Bands, 5 FCC Rcd 3861, 3868-69 (1990) ("Historically, the Commission has favored competition whenever feasible."); In the Matter of Competition in the Interstate Interexchange Marketplace, 5 FCC Rcd 2627, 2628 (1990).

[16] 603 F.2d at 272 (citing Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359 (1933) (characterizing the Sherman Act as "a charter of freedom")).

Monopolists distort markets. Seeking to maximize profits, they maintain prices higher and output lower than the socially optimal levels that prevail in purely competitive markets.[17] Moreover, as Judge Learned Hand wrote, our national policy favoring competition is based on the belief:

> that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.[18]

Expanding on this thesis, the Berkey Photo Court characterized monopoly power as follows:

> Because, like all power, it is laden with the possibility of abuse; because it encourages sloth rather than the active quest for excellence, and because it tends to damage the very fabric of our economy and our society, monopoly power is "inherently evil."[19]

The danger here is that firms with power in other markets (i.e., long distance, cellular, local exchange) will use that power to become dominant in PCS. In other words, firms not associated with dominant firms will not be able to compete.

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[17] F. Sherer, Industrial Market Structure and Economic Performance 13-19 (1970).

[18] United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945).

[19] 603 F.2d at 273 (quoting United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 345 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954).

The LECs, AT&T and cellular operators have unfair advantages over other PCS entrants. They have captive subscribers to whom they can cross-sell PCS services at a discount. For example, a cellular operator may hold a 2-for-1 sale ("buy cellular service and get a PCS handset free for 1 year") . A LEC could offer PCS service as part of its basic service package. LECs and cellular operators enjoy economies of scale protected by exclusive franchises. They and AT&T have established brand names and customer loyalty. They can buy and sell equipment at volume discounts. They have equipment (e.g., towers, vehicles, switches) in place. They have sales and service personnel already in the field. They can target potential subscribers on proprietary customer lists.

Because of the wireline set-aside in the cellular market, LECs are doubly suspect -- not only do they retain monopoly control over landline local service in every community, LECs also are among the largest cellular operators. In addition, the Commission's decision to relax restrictions on LEC entry into the "non-wireline" cellular franchises[20] means that, in many communities, LECs control both the local exchange and the cellular franchises. There is no reason to encourage even

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[20] See James F. Rill, 60 R.R.2d 583 (1986), recon. granted on other grounds, 1 FCC Rcd 918 (1986).

greater market concentration by allowing LECs to enter yet another potentially competitive service.[21]

In addition, LECs, AT&T and cellular operators will have the power and incentive to cross-subsidize their PCS activities with monopoly profits[22] and to discriminate in favor of their PCS affiliates, thereby disadvantaging their PCS competitors. While LCI acknowledges that the Commission could seek to prevent any abuses, history informs us that oversight cannot completely deter anticompetitive conduct.[23] Among other reasons, such activities are extraordinarily difficult to detect, and even diligent regulatory oversight is futile.[24] These concerns alone, therefore, warrant exclusion of these firms from the PCS market, at least in its initial stages.

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[21] To the extent LECs desire to enhance their networks with radio-based services, they can lease facilities from PCN operators or develop Part 15 technologies. A 10 Mhz "tail" should not be made available to LECs. See Notice, ¶ 77.

[22] Many unaffiliated PCN entrants, on the other hand, will need to invest large sums to construct their systems and to wait some time until receiving an adequate rate of return.

[23] Even the restrictions of the MFJ have proved inadequate to overcome the BOCs' proclivity to discriminate. In its triennial review. the MFJ Court found that the anticompetitive activities of the BOCs had apparently continued, noting that "[t]he [BOCs] are of course limited int he breadth and scope of the anticompetitive activities in which they are able to engage inasmuch as the most effective vehicles for such activities are beyond their reach due to the existence of the core restrictions of the decree. What is startling, however, is given the relative paucity of the field available for such acts, in how many ways these companies appear nevertheless to have managed to discriminate and to cross-subsidize." United States v. Western Elec. Co., 673 F. Supp. 525, 580 (D.D.C. 1987).

[24] Id. at 541.

The LECs, AT&T and cellular operators pose yet another threat to PCS competition by virtue of the tremendous financial resources that they have amassed as monopoly carriers. These firms may simply overrun their less well-funded PCS competitors, driving them out of the market before they have had a fair opportunity to compete.[25] While size itself is not necessarily a competitive evil, the Supreme Court has noted that "size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past."[26] They have amply demonstrated their proclivity to take advantage of their monopoly power to disadvantage competitors. The lessons of those experiences should not be lost in forging policies and rules for PCS.

LCI has additional concerns about potential entry by cellular operators. First, cellular operators already control a substantial, exclusive block of radio spectrum and, under current Commission policies, have broad flexibility in the way that spectrum is used to provide services to the public.[27] There is no reason to give these carriers additional spectrum to provide

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[25] The MFJ Court expressed a similar concern when it barred AT&T from electronic publishing for a period of several years, noting that "[t]here can be no doubt that, if AT&T entered this market, the combination of its financial, technological, manufacturing, and market resources would dwarf any efforts of its competitors." 552 F. Supp. at 182.

[26] United States v. Swift & Co., 286 U.S. 106, 116 (1932). As Justice Douglas stated in Griffith: "size is of course the earmark of monopoly power." 334 U.S. at 107 n.10.

[27] See 47 CFR § 22.930 (1990).

mobile communications services. It is more reasonable, and more consistent with the Commission's pro-competitive policies, to introduce new players in the market so that consumers can be assured of wider variety of mobile communications services at rates which better reflect costs.

Although cellular and PCS services meet different needs of different markets by different methods, in a manner similar to radio, newspapers and television, they nevertheless overlap. Thus, cellular operators will have no incentive to provide PCS using new frequencies at prices competitive with cellular radio service. Moreover, cellular operators will have every reason to delay the introduction of PCS. In contrast, non-cellular PCS providers will have tremendous incentives to make PCS a reality and to market it at prices that will attract large numbers of consumers. Such operators, unlike cellular providers, will not be constrained in their marketing of PCS because of their interests in overlapping services.

By prohibiting LECs, AT&T and cellular providers from obtaining PCS licenses in new frequency bands, at least until competition in this fledgling marketplace has had an opportunity to develop, the Commission can ensure that such competition will not be jeopardized. Once PCS providers have established themselves in the marketplace, the danger of allowing these firms into the market may diminish.[28] Until that time, however, they

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[28] See 552 F. Supp. at 186 (where the MFJ Court found that a seven-year limit on the electronic publishing ban on AT&T would (continued...)

should not be licensed to provide PCS services on new frequencies in any market.

IV. Conclusion

The Commission should allocate 200 MHz of spectrum to PCS and license 4-5 operators in each market. Given the need to establish a competitive market, the LECs, AT&T and cellular operators should be ineligible initially to be PCS licensees.

Respectfully submitted,

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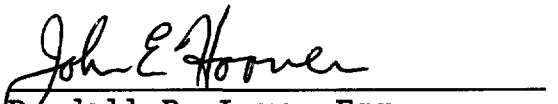
LCI INTERNATIONAL



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[28](...continued)
be sufficient for the acquisition of sufficient strength by individual competitors to permit them to compete). See also 552 F. Supp. at 194 ("[i]t is probable that, over time, the Operating Companies will lose the ability to leverage their monopoly power into the competitive markets from which they must not be barred").